April 14, 1999

In the Matter of:	*	
	*	
Kenneth A. Markee	*	
Claimant	*	
	*	
v.	*	Case No. 1998-LHC-2480
	*	
Hodgdon Yachts, Inc.	*	
Employer	*	OWCP No. 1-143840
	*	
and	*	
	*	
Acadia Insurance Co.	*	
Carrier	*	

Appearances:

Gary A. Gabree, Esq.
For the Claimant

Cathy D. Roberts, Esq.
For the Employer/Carrier

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearings were held on December 10 and 11, 1998 in Portland, Maine at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer/Carrier. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**

CX 80A	Attorney Gabree's letter filing	01/11/99
CX 81	Various Correspondence relating to obtaining a purple heart for Elliott B. McDougal, the grandfather of Claimant's wife (a total of fifteen pages)	01/11/99
CX 81A	Attorney Gabree's letter filing the	01/11/99
CX 82	December 11, 1998 report of James T. Wilson, M.D.	01/11/99
CX 82A	Attorney Gabree's letter filing the	01/11/99
CX 78	December 8, 1998 Deposition Testimony of Maurice E. Knapp, M.D., a document provisionally identified at the hearing, as well as the	01/11/99
CX 83	December 29, 1998 Deposition Testimony of Chad Noah Duncan	01/11/99
CX 83A	Attorney Gabree's letter filing a status report relating to additional post-hearing submissions	01/22/99
CX 83B	Attorney Gabree's letter filing the	02/11/99
CX 79	January 11, 1999 Deposition Testimony of Robert Amidon, a document provisionally identified and discussed at the hearing	02/11/99
RX 10A	Attorney Roberts' letter filing the	02/16/99
RX 11	January 5, 1999 Deposition Testimony of Curt Crosby	02/16/99
RX 12	January 6, 1999 Deposition Testimony of Merritt Grover (with attachments)	02/16/99

RX 13	December 17, 1998 Discovery Deposition of Robert Amidon (two volumes)	02/16/99
RX 14	January 18, 1999 report of Seth Kolkin, M.D.	02/16/99
RX 15	Attorney Roberts' letter requesting a short extension of time for the parties to file their post-hearing briefs (the request was granted)	03/12/99
CX 84	Claimant's brief	03/18/99
RX 16	Respondents' brief	03/19/99

The record was closed on March 19, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on April 14, 1998 in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion on April 24, 1998.

6. The parties attended an informal conference on July 10, 1998.

7. The applicable average weekly wage is $582.13 based on Claimant's earnings with this Employer.

8. The Employer and its Carrier, just prior to the hearing, agreed to begin the payments of compensation benefits to Claimant.

The unresolved issues in this proceeding are:

1. Whether Claimant's disability is due to a work-related injury in the manner alleged by him.

2. If so, the nature and extent of his disability.

3. Whether Claimant's average weekly wage should include his concurrent earnings as a self-employed painter and

4. If so, Claimant's average weekly wage as of April 14, 1998.

5. Claimant's entitlement to medical benefits, including the recommended surgical procedure, and interest on any past due compensation, and his attorney's entitlement to a fee plus litigation expenses.

Summary of the Evidence

Kenneth A. Markee ("Claimant" herein), thirty-five (35) years of age, with an eleventh grade formal education and a GED obtained while serving in the U.S. Army, as well as an employment history of manual labor, began working for his father's company and he had myriad duties such as house framing, roofing, painting and wallpapering. In 1984 or 1985 he became self-employed as a painter under the name East Coast Painting, a name which was changed, for legal reasons, to Markee Painting Company ("MPC"), a company which also did myriad jobs in connection with home improvements such as painting, wallpapering, floor sanding, etc. Claimant did most of these jobs by himself, although at times he hired others to assist him meet a customer's deadline. While he did mostly residential work, he also did some commercial and industrial jobs, Claimant remarking that to do this work, he had to utilize his knowledge of blueprints, cost estimating, purchasing supplies, organizing work schedules, etc. Industrial jobs were physically demanding and often involved setting up stagings, sandblasting, and determining which chemicals and solvents had to be used. On the other hand, residential painting required the use of user-friendly types of paint and environmentally sound practices. He also installed tile flooring, carpeting, drywall and masonry products. He had to use a variety of tools and equipment to perform his tasks. He did both interior and exterior work. (TR 53-71)

Claimant is a most industrious person and for a period of about five months he was concurrently working at three jobs. In December of 1996 he began working at the Booth Bay Harbor School System as a custodian and on January 20, 1997 he began working as a painter for Hodgdon Yachts, Inc. ("Employer"), a maritime facility in East Boothbay Harbor, adjacent to the navigable waters

of the Atlantic Ocean where the Employer builds and repairs yachts and vessels. Claimant was earning $8.30 per hour as a custodian after he had completed his day shift at the Employer where he was earning $14.00 per hour at his hiring. He worked weekends and nights as needed as a self-employed painter. However, in June (?) of 1997 he stopped working as a custodian because his forty hours on that job conflicted with his forty hours of work at the Employer's shipyard. However, he continued to operate as MPC, working weekends and nights, Claimant remarking that he worked so many hours to establish his new business in town and to support his growing family. In fact, he went to work for the Employer because of the fringe benefits available there. Moreover, as the Employer builds large yachts, Claimant wanted to enhance his skills as a painter/varnisher; his title is that of a painter/boat builder and he basically did whatever was needed on the yachts, such as hull installation, fiberglassing, painting, varnishing, cabinet making, doing inventory work, storing and receiving supplies, etc. (TR 71-83)

On April 14, 1998 Claimant was working on the **Antonista**, a 130 foot single masted sailing vessel, Claimant testifying that painting on a vessel is much different than painting, for example, a single family ranch-style home, because of the vessel's curved or elliptical surfaces, working in tight and confined spaces. On the day in question he was working on the sail locker toward the aft of the vessel. The sail locker – 9 feet long, 3 feet high by 3 feet in width – was an area into which he actually had to crawl in order to sand and smooth the wood surfaces in preparation for painting. (TR 83-84)

Claimant, while working in the prone position for several hours and with his shoulders wedged against the bulkhead and masthead, reached behind himself to grab a chisel which he needed as part of the sanding process. He immediately experienced the onset of low back pain a condition which he diagnosed as "very painful." He had to crawl out of the deck locker through the hatch and he went to the office and asked to speak to Tim Hodgdon, the Employer's officer. Claimant was told he was in a meeting and he then told personnel in the office that he had injured his back while working on the yacht, that he would have to go home and might be in the following day. Claimant was in such pain that his co-workers had to take him out of his work clothes. Claimant, who was unable to complete the shift until 3:30 p.m., was taken home by Scott Stewart at 2 p.m. Claimant had difficulty getting into and out of the car and, because he had "severe back pain" radiating down his right leg, he "felt every imperfection" in the roads on the way home. He had muscle tightness, dizziness and was nauseous when he arrived home. (TR 84-86)

However, the symptoms worsened and he went to the Emergency Room at nearby St. Andrews Hospital. A muscle strain was diagnosed and he was administered Demerol and Phenergan, and Dr. Dumdey prescribed Flexeril and Vicodin, cold and heat packs. Claimant was told to stay out of work and to see Dr. Webster on Friday, April 18th. He was released from the Emergency Room at 4 p.m. (CX 5 at 11, CX 6 at 12-13, CX 7 at 14) Dr. Charles P. Kronenthal, Jr., opined that Claimant's symptoms were due to his April 14, 1998 work-related injury and that he could return to work on April 20, 1998. (CX 13 at 24)

Dr. Dana J. Webster examined Claimant on April 21, 1998 and the doctor certified that Claimant could not return to work "pending results of MRI (and) consult with a neurosurgeon." (CX 15 at 26) As of April 27, 1998, Claimant was still experiencing low back pain and some knee "unsteadiness" and he was told to see Dr. Moran on April 30, 1998 as scheduled.

Claimant's April 22, 1998 MRI was read by Dr. Christian Wagner as showing a "(c)entral annular tear at L4-5 with mild bulging of the disc." (CX 42 at 168)

Dr. Sean J. Moran, an orthopedic surgeon, opined that Claimant, as of April 30, 1998, could not return to work (CX 1) and, as ultrasound provided little relief (CX 1 at 3), additional tests were performed and his lumbar spine x-rays "show(ed) some irregularity of the left L4-5 facet joint." (CX 1 at 4) Dr. Moran, recommending "an epidural steroid injection," kept Claimant out of work. (CX 1 at 4-7, CX 2 at 8) Dr. Moran also opined that Claimant's low back problems were caused by his work injury. (CX 3 at 9) Claimant had physical therapy at St. Andrews Hospital on June 18, 1998 (CX 9 at 17-18, CX 18 at 31) (**See also** CX 7 at 152-157, CX 38 at 1158-160)

Dr. Webster referred Claimant to Dr. James T. Wilson (CX 18 at 30) and Dr. Wilson, a neurosurgeon, agreed that Claimant "certainly (has) an annular tear at L4-5 level which (the doctor thought) is the main cause of all of his symptoms." Dr. Wilson discussed with Claimant the possibility of a spinal fusion but the doctor suggested that Claimant postpone such surgery for as long as possible because of his age "for (the success of) these procedures are not all encouraging to date" and until "all other conservatives measures have been exhausted," the doctor remarking "that this gentleman would best be served under the care of a physiatrist who can act as a 'captain of the ship' with regards to rehabilitation of his back pain" and that "functional assessments and work capacity evaluations can be performed through their expertise." (CX 23 at 75-78, CX 24 at 79-80)

Dr. Richard J. Leidinger, a urologist, examined Claimant on May 21, 1998 upon referral from Dr. Moran for evaluation of "one episode of slight incontinence" and Dr. Leidinger diagnosed "minimal to mild bladder outlet obstructive symptoms," a condition which "may be a slight consequence of his herniated disc," but treatment of this condition was deferred as the "(p)atient seems most distressed by his back problem at this time." (CX 22 at 73-74, CX 36 at 140-151)

Physical therapy did not provide the anticipated relief and the therapist so advised Dr. Wilson by his note on September 8, 1998. (CX 10 at 19)

Claimant's medical records also reflect that chiropractic manipulation by Ron P. Boufford, B.S., D.C., provided little or no relief. (CX 28 at 127-128, CX 29 at 129, CX 30 at 130-CX 34 at 148)

Dana J. Webster D.O., Claimant's primary physician, stated as follows in the doctor's July 21, 1998 note:

> **Mr. Kenneth Markee has complained of numbness in his back since his original injury of April 14, 1998.**
>
> **This problem has been in addition to his lumbar spine injuries.**

(CX 19 at 34) (Emphasis added.)

Dr. Wilson next saw Claimant on September 9, 1998, at which time Claimant was "in bitter pain" due to the low back and cervical pain. Dr. Wilson opined that Claimant's MRI scan does show "a slight bulge at the C4-5 level," that his cervical spine x-rays show "some early spondylosis" and his MRI of the lumbosacral spine shows "a focally degenerated and injured disc" and the doctor recommended "a lumbar interbody fusion" as all other conservative measures have provided no relief. Dr. Wilson further opined that Claimant's symptoms were genuine, that he "is a very straight shooter and has no secondary gain issues that (he could) delineate." Dr. Wilson recommended the following treatment plan as most efficient and orderly: a discogram, a neuropsychological evaluation and an evaluation by a physiatrist. (CX 24 at 81-82) As of that examination the doctor's diagnosis was degenerative disc disease at L4-5. (CX 24 at 84, CX 43 at 169) The parties deposed Dr. Wilson on October 29, 1998 and the doctor reiterated his opinions that Claimant's chronic lumbar and cervical pain symptoms were causally related to his April 14, 1998 injury and these opinions withstood intense cross-examination by Respondents'

counsel. (CX 27 at 87-126)

Dr. Webster referred Claimant to Casco Bay Rehabilitation for a "rehabilitation medicine consultation" because of chronic "low back pain, which has not improved despite treatment" and Syed Kazmi, M.D., diagnosed Claimant's symptoms as due to "discogenic low back pain," a diagnosis supported by a recent MRI study which ... (shows an) L4-45 disk tear," opined that Claimant "would benefit from a structured physical therapy program" focussing "on gently improving his flexibility given the significant muscle spasms in paraspinals and gluteal region." (CX 39 at 163-164, CX 40 at 165-166, CX 41 at 167)

Joseph R. Fitzpatrick, Psy.D., Director of Behavioral Medicine, Pain Management Services, Health South in South Portland, examined Claimant on October 5, 1998, "for psychological evaluation in reference to his potential candidacy for spinal cord fusion," and the doctor opined that Claimant was "an appropriate candidate for a spinal cord fusion from a psychological vantage point" and the doctor "suggest(ed) that potentially post-surgical intervention...(would involve) some degree of cognitive behavioral pain management/stress reduction training," as well as "a comprehensive program with regard to functional ability and physical restoration," to include "one on one individual training in cognitive behavioral strategies and coping techniques." (CX 75 at 369-371)

Claimant underwent a three level lumbar discogram on October 7, 1998 and Dr. Matthew Ralston reported that that diagnostic test showed "(d)egenerated disc at L4-5 and L5-S1." (CX 76 at 372-380)

John Pier, M.D., examined Claimant on October 26, 1998 and Dr. Pier, after the usual social and employment history, his review of diagnostic tests and the physical examination, gave these impressions (CX 47 at 178-179):

1. Likely discogenic pain.
2. No evidence of symptom magnification.

Dr. Pier opined that Claimant's lumbar symptoms are causally related to his April 14, 1998 shipyard accident, that conservative treatment has failed to provide the anticipated relief, that the doctor can "see no other specific treatments that are likely to provide him benefits," that "he is a reasonable candidate for lumbosacral fusion," that "Mr. Markee has made a decision that surgery is likely his best option" and the doctor saw no "reason to dissuade him from this ..."

Dr. Thomas F. Mahalic, a neurosurgeon, examined Claimant on

November 17, 1998 and the doctor, after the usual social and employment history, his review of diagnostic tests and the physical examination, "totally concur(red) with Dr. James Wilson's plan for interbody fusion at L4-5 with the Ray threaded fusion cage;" the surgery was "discussed with the patient and his wife and they totally concur." (CX 46 at 177)

The Employer and its Carrier, positing that Claimant did not sustain a work-related injury as he alleges, initially refused to accept the claim but did commence payment of certain payment of benefits as of July 21, 1998. (ALJ EX 7) Claimant's wages with the Employer are in evidence as CX 53, the Employer's state injury report is dated April 14, 1998 (CX 54) and the Form LS-202 is dated May 4, 1998 (CX 55) and the injury was controverted on May 15, 1998. (CX 56) Claimant's pre-hearing statement is in evidence as CX 58. The informal conference took place on July 10, 1998 (CX 59) and the claim was transferred to the Office of Administrative Law Judges on July 10, 1998. (CX 60) The Notice of Hearing was issued on August 7, 1998 and hearings took place on December 10 and 11, 1998. (CX 67) The claim was again controverted on August 12, 1998. (CX 68) Records relating to the income and expenses of MPC are in evidence as CX 74.

Claimant was examined on August 31, 1998 by Dr. Seth Kolkin at the Respondents' request and the doctor, a specialist in neurology, after the usual social and employment history, his review of diagnostic tests and the physical examination, reported that "Mr. Markee has a normal neurologic examination and some evidence of lumbar disc injury as evidenced by the MRI scan of the lumbosacral spine," that "Dr. Kazmi is correct and that the best diagnosis for Mr. Markee would be low back pain based on this lumbosacral spine injury," that Claimant's chronic low back pain "does seem directly related to the April 14, 1998 incident," that "his only limitations would be related to awkward positioning and repeated heavy lifting," that his upper back, neck and upper extremities symptoms "are without any associated objective abnormalities and, in reviewing the records, there is not even a clear temporal association of those symptoms with Mr. Markee's initial injury. Dr. Kolkin further opined that Claimant "continue on with his physical therapy, perhaps a course of tapering prednisone would be helpful," that he had reached maximum medical improvement and that his injury had resulted in a five (5%) impairment of the whole person, according to the AMA **Guides to the Evaluation of Permanent Impairment**, Fourth Edition, table 72, page 110. (RX 6)

On December 11, 1998 Dr. James T. Wilson, a neurosurgeon, sent the following letter to Claimant's attorney (CX 82):

"This note is in response to your letter dated December 11, 1998 and phone conversation dated same. I find it extremely unlikely that Mr. Markee injured himself prior to the date in question. I also find it extremely unlikely that this gentleman could have been working at his job in the ship yard, with this injury, without anybody noticing the significant disability.

"In my opinion, this gentleman has been very honest with me and his story makes absolute since (SIC), both in a medical and a timely manner. He has no secondary gain, in my opinion, other than the fact that he would like to get better and have his pain relieved.

"I, again, state that I find it virtually impossible that this gentleman could have physically been able to perform his work at the boat yard following this gentleman's apparent injury."

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, except as specifically discussed below, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda**

v. Excavation Construction, Inc., 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v.**

Universal Maritime Serv. Corp., 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea**

Tac Alaska Shipbuilding, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with

substantial evidence which establishes that Claimant's employment did not cause, contribute to or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluation all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case at bar, the Employer and its Carrier ("Respondents") submit that Claimant did not sustain a work-related injury on April 14, 1998 as he alleges (CX 56 at 251), in which May 15, 1998 Form LS-207 the Respondents identify the nature of the injury as to the "(b)ack and other related body parts." Thereafter, by LS-207 dated August 12, 1998 (CX 68), the Respondents "dispute(d) the claim that a cervical work-related injury occurred and, therefore, controvert(ed) payment of medical treatment for the neck or cervical spine," although, according to that form, "Voluntary medical payments are being made for treatment related to the alleged low back injury" but Respondents, as of August 12, 1998, would not authorize "pre-payment for a cervical MRI scan."

Claimant offered numerous witnesses in support of his position that he sustained injuries to his low back, cervical and upper extremities on April 14, 1998 while he was working in an awkward position, in a tight and confined area, on the **ANTONISTA**, a vessel being built at the shipyard. On the other hand the Respondents have offered the testimony of Theodore J. Widmayer, Bruce David Russell and Curt Crosby in support of their position that Claimant was not injured on the job as he alleges. Thus, the Respondents have rebutted the statutory presumption in Claimant's favor and I shall now weigh and evaluate all of the evidence.

At the outset, it is well to keep in mind certain basic

principles of workers' compensation law applicable to this case.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As noted, Claimant has offered the testimony of Darcie Marie Page who first met Claimant in 1994 when he did some work at her house involving sanding and varnishing her porch. She was very satisfied with the quality of the work done, and the work was performed timely. He also did some work refinishing her dining room floor on April 10 and 11, 1998. According to Ms. Page, she

saw Claimant working very hard on those two days using a number of tools to perform these tasks, including a big floor sander. He worked until 7:30 PM on the Friday night and until 4:30 PM on the Saturday. Claimant who is married to the former Julie Page, a distant cousin of Darcy Marie Page, also attended a 40th birthday party for a mutual friend, Susie Giles, and Claimant was in no distress that evening as he socialized and mingled with the guests. (TR 186-192)

Barrett Andrew Clark, who has worked for the Employer for two (2) years or so as a systems mechanical technician, has primarily worked on the wire ways on the **ANTONISTA** and has known the Claimant since they began working together, although he knew Claimant "a bit" before working together. Their first job together involved planking the layers of lumbar to make the hull and they have since worked on other aspects of the boat. Shipbuilding is physically demanding work and involves, **inter alia**, lifting and carrying heavy items for installation on the boats. They have also golfed together and he did ask Claimant once for his assistance in helping a friend move some furniture in November or December of 1997 on a snowy day. Claimant did not complain about any back problems at that time or at any other time during which they worked together, even on April 14, 1998, the date of Claimant's accident. He did not help get Claimant out of his tie-back work clothes but he did see Claimant after he had been injured and his work clothes had been removed. (TR 193-200)

Lee R. Karkuff who began working as a joiner for the Employer on August 10, 1997 met Claimant at that time. They have worked on joint assignments such as cleaning the glue area once a week and he also testified that Claimant did not complain about back pain during the times they worked together. While Mr. Karkuff worked at a bench and did not often go on the boats he could see Claimant working on the deck carrying his paint, other chemicals and supplies, and doing his vacuuming, sanding and painting. He lived on Claimant's property in a trailer for four months and he paid rent to Claimant. On April 14, 1998 Claimant was performing all of his assigned duties without any difficulty and that afternoon he did see Claimant going to the deck locker to sandpaper the interior portion and later that day he saw the Claimant coming around the bow of the boat, only this time he was "walking slowly," "limping" and he looked "puzzled and dazed." He came over to Mr. Karkuff's bench, told him that he had injured his back while trying to turn while working on that locker. His legs went "numb" and Scott Stuart took Claimant out of his work clothes and Claimant and Mr. Stuart went downstairs, Mr. Karkuff remarking that he heard Mr. Stuart volunteer to drive him home if he needed a ride, and that he saw Claimant several times thereafter at his home and each time he

was not his usual jovial self and was standing on his porch, even though there were two (2) chairs nearby. (TR 200-208)

Scott Stuart, who has worked for the Employer for four years, met Claimant in January of 1997 and they have worked on joint assignments, such as hull fabrication and then, after the so-called "roll-over," they worked together painting **THE ANTONISTA** and were usually within thirty-to-forty feet of each other somewhere on the boat. Claimant had no problems doing that physically demanding job, did not complain of any back pains and did not decline any work assignment because of any physical problems. On April 14, 1998 Mr. Stuart picked up Claimant at his house and he drove Claimant to work, arriving there about 6 A.M. Claimant was his usual self and there were no complaints about any physical problems. He next saw Claimant at about 1:45 p.m., at which time Claimant told him that he had hurt his back, Mr. Stuart remarking that Claimant was experiencing "a great deal of discomfort." Claimant called his wife for a ride home but she could not leave the house as their young children were napping. Thus, Mr. Stuart drove Claimant home after Claimant walked "slowly" to the car parked about 30-40 feet from the office. Claimant had difficulty getting into/out of the car, had trouble breathing, and again walking "slowly" and "uncomfortably." (TR 209-219)

Donald Peter Child, who has worked as a carpenter for the Employer for two years and four months, also met Claimant in January of 1997, and they have also worked together on joint assignments, often working within ten (10) feet of each other. Claimant did not complain about any back problems, was able to perform all of his work assignments and did not refuse any work assignment because of back pain or any other physical problems. Mr. Child also testified that shipbuilding is physically demanding work and that on April 14, 1998 Claimant was working on the aft of the boat in the deck locker, work he had been performing for at least several days. According to Mr. Child, the highlight of that day occurred when he saw Claimant on his back sanding over his head in that deck locker and, as it was a rather hot day, Mr. Child slipped Claimant a piece of gum through the porthole, with both exchanging jokes in a sort of good-natured banter among co-workers. Mr. Child did not see Claimant that afternoon. (TR 219-232)

Jennifer Page Osman, who is the sister of Claimant's wife, first met her future brother-in-law in 1989 and she has since seen him many times thereafter at family functions, etc. She also worked for MPC while she was in high school, doing painting, cleaning windows, etc. She described Claimant as a very industrious, hardworking person who is devoted to his family and who is already ready to help others. Prior to April 14, 1998 he

was able to work those three (3) jobs and he did not complain of any back pain or refuse to perform any job assignments because of any physical problems. He was a very active sportsman participating in numerous activities at her parents' camp in Damariscotta. However, after the April 14, 1998 injury, he was not able to engage in any of those activities last summer, spent most of the time laying down on a futon inside the camp. She saw Claimant and her sister on Saturday evening, April 11th, at the birthday party for a family friend, Susie Giles, where they spent several hours. The next day, Easter Sunday, the family gathered at her sister's house for Easter dinner and Claimant assisted in preparing the yard for dinner, including carrying tables and trucks from a pickup truck, again performing all of these chores without any difficulty. (TR 233-243)

Thomas Landry, who has worked as a carpenter for the Employer for three (3) years, met Claimant in January of 1997 and they have worked on joint assignments, such as unloading lumber, equipment and other supplies from the delivery trucks, moving material around the yard. Anyone with a "bad back" would not be asked to participate in unloading or lifting heavy items and Claimant was not excused from those assignments. Moreover, he did not complain of any back pain and did not decline any job assignments because of any physical problems. Shipbuilding is physically demanding job. (TR 245-251)

Julie Page Markee who married Claimant on June 29, 1991, has known him since 1989 as a very hard-working and industrious person, and one who is always ready to lend a helping hand to others, her husband usually working eighty (80) hours per week to support their three young children, with their fourth child due early in January of this year. They purchased an old house in April of 1992, the house was completely gutted and Claimant and other family members have completely renovated and extended the house and added a dormer. He has also built, rock by rock, a 180 foot stone wall, just like the kind epitomized by Robert Frost. Claimant had no back problems prior to April 14, 1998 and played in an adult hockey league until 1994 or so. The weekend of April 10th, her husband was his usual self when he returned home from work and he worked the next day and they attended that birthday party for Susie Giles where Claimant seemed to be enjoying himself. Easter Sunday dinner was at her sister's house and again he socialized with everyone, including helping her father set up the tables and chairs for all of the family members. Claimant did not work on Monday, April 13, 1998, because she had to take their youngest child to the doctor and Claimant stayed home to take care of the other children. There were no complaints about any back problems that day, as well as the next morning when he went to work. She next saw Claimant that afternoon, at about 2-2:30 p.m., at which time he could barely get

into the house, could hardly stand, his face was “a shade of purple,” tears streaming down his face and he had difficulty breathing, Mrs. Markee remarking that she has never seen her husband look like that. Claimant asked her to call the hospital and she drove him to the hospital. Since April 14, 1998 their whole life has changed, as her husband really can do very little. He no longer operates MPC, cannot work and they have filed for bankruptcy protection. Claimant is no longer the jovial person he used to be. (TR 309-349)

Stanley D. Page, Claimant’s father-in-law, has known him for about nine (9) years as a very industrious and hard-worker and they both have done much work on renovating Claimant’s house. Claimant was a very active person prior to April 14, 1998 and since then he can do very little and he and other family members have had to pitch in to help finish several jobs, such as work on the Widmayer summer camp. He also saw Claimant on the weekend of April 10th and he was not complaining at any time of any back problems even on the Monday or day before the April 14, 1998 accident. (TR 378-391)

Sandra Page, Claimant’s mother-in-law, also testified that Claimant was a very hard-worker who worked as many as three jobs to provide for his family, that Claimant and his wife have participated in numerous family functions over the years and Claimant not only did not complain of any back problems but also did not decline any job because of any physical problems. After April 14, 1998 Claimant has been unable to do any of his former work and she and other family members pitched in to help finish the work to be done at the Widmayer home. (TR 392-405)

On the other hand, Respondents have offered the testimony of Theodore J. Widmayer, who owns a summer camp at Boothbay Harbor, that he had hired Claimant to paint his house about five (5) years ago and Mr. Widmayer was pleased with the quality and timeliness of the work. In the Summer of 1997 he again discussed with Claimant some refinishing and painting work with the understanding that the work had to be completed by May 15, 1998, the traditional start of the summer season in Maine. The contract was finalized on August 21, 1997 at a price not to exceed $7,500.00 based on labor charge of $18.00 per hour plus materials. A $2,000.00 deposit was paid on August 24, 1997 and another $2,000.00 was paid on September 30, 1997. On or about Columbus Day, Claimant and Mr. Widmayer discussed the work that still had to be done and Claimant produced an invoice from Scott Blevins, one of his subcontractors to substantiate the hours put it on the house. Mr. Widmayer then agreed to advance another $2,000.00 to Claimant. In late March or April of 1998 Claimant advised him by telephone that work on the house had been delayed because he had hurt his back “moving a sea chest.” Claimant assured him that the May 15th deadline would be

met but the house was not ready when the Widmayers went up to Maine for Memorial Day weekend to open up the house on May 25th. Mr. Widmayer saw that Claimant was in obvious pain because of a disc problem but, being a compassionate person, he extended the completion deadline to June 19, 1998. The Widmayers returned on that date, saw that "only 50% of the work had been done," were most upset, hired another company to finish the work, spending another $6,974.00 to complete the work. Mr. Widmayer denied that his December, 1997 electric bill of $517.00 caused him to stop work on the house. (TR 252-282)

Bruce David Russell, who has as worked at the Employer's shipyard as a joiner since July 8, 1997, started working there after Claimant, Mr. Russell recounting a conversation with Claimant at his work bench in the shop about two-to-three weeks before April 14, 1998, during which time Claimant told him that he had a back injury, that he was complaining about back pain and he asked Mr. Russell — who had also been in the military — as to how he (Claimant) could obtain "back benefits" from the Veterans Administration for two discs he had messed up in the Army while rapelling from a helicopter. Mr. Russell told Claimant to contact the V.A., Mr. Russell remarking that Claimant had known that he (Mr. Russell) had already gone through the workers' compensation system. Scott Escency, who also was a part of the conversation, gave Claimant the name of a person to contact at the V.A. Mr. Russell denied any animosity toward Claimant, and denied that they had even worked together, although they did work near each other in the same room. Mr. Russell has had a disc fusion by Dr. Southmayd. Mr. Russell who could not recall seeing Claimant working in March of 1998 was renting at that time from Jeff Curtis and Scott Blevins was painting there at the time. However, he was "making a mess there" and Mr. Russell complained to the landlord and the neighbors about the noises being made there. Mr. Russell believes that Claimant had injured his back elsewhere and was using the Employer's shipyard merely as an excuse or "scam" to collect workers' compensation. (TR 283-296)

The parties deposed Maurice E. Knapp, M.D., on December 8, 1998 (CX 78) and Dr. Knapp, who is an optometrist with an office in Farmington, Maine and owns two pieces of property in the Boothbay region, testified that about eight or nine years ago his house on Squirrel Island required painting, that he contracted with the Claimant to do the painting and that he was satisfied with that painting job, as well as painting work Claimant performed on the doctor's other property at Newagen. According to Dr. Knapp, the work was performed timely and the doctor was also satisfied with the prices charged by Claimant, although Dr. Knapp remarked that the work at the Newagen house required a second visit to complete the work sometime in the latter part of 1997, a delay due, in part,

to Claimant's medical testing by a gastroenterologist. Dr. Knapp called Claimant in the summer of 1998 and asked if he could repaint the Squirrel Island house. Claimant declined that work "because he was having problems with his back." Dr. Knapp would recommend Claimant to others looking for a reliable painter. (CX 78 at 3-11)

Dr. Knapp believes that the painting work was completed by "Scott somebody or other" but the doctor "never met any of those people" working on his house. The checks related to the Newagen painting job are dated August 12, 1997, September 11, 1997 and March 26, 1998, the latter check being for $233.80 to repair damage caused by a bursting pipe. Claimant told Dr. Knapp about his stomach problems in December 1997 or January of 1998. All of the checks were made out to Markee Painting. (CX 78 at 11-21)

The parties deposed Chad Noah Duncan on December 29, 1998 (CX 83) and Mr. Duncan, who has worked as a commercial fisherman since 1990 or 1991, worked for the Employer from February of 1997 until April of 1998 and is slated to return to work there on January 4, 1999. Mr. Duncan described his work as follows: He "worked in the engineering. Engine beds and exhaust and that kind of stuff, installing tanks." Mr. Duncan met Claimant in February of 1997 and he and Claimant "worked together somewhat ... planking the boat and laying the keel," Mr. Duncan remarking that this referred to "(p)utting the last layer of planking on the boat" and "get(ting) in ready so we would fiberglass it and then roll it (the boat) upside down." Mr. Duncal and Claimant worked together on the boat "they're building at Hodgdon Yachts, **Antanesia**" (SIC). Mr. Duncan has also worked as a painter for Markee Painting doing various tasks such as scraping, painting and staining, this work beginning in April of 1997, shortly after he (Mr. Duncan) began to work for the Employer. Mr. Duncan and Claimant ended their work day with the Employer at 4:30 P.M. and he would then work with Claimant from 5 P.M. until around 11 P.M. Mr. Duncan worked 10 hours each day, four days per week, for the Employer, did not work there on Fridays and used that day "to pull" his lobster pots and then help Claimant with his painting jobs, work which included both interior and exterior painting. Mr. Duncan worked on "six or seven jobs" from April of 1997 through April of 1998, Mr. Duncan remarking that Claimant "was an excellent painter" and that only one customer Curt Crosby was dissatisfied with the quality of the work performed. Mr. Duncan worked on that job and he believed that Claimant returned to complete the work which could not be completed timely because of the weather and the lack of water pressure on the property. On one occasion he and Claimant went to the home of Don and Darcie Page to "move a refrigerator and a stove back into the kitchen." Prior to April 14, 1998 Mr. Duncan did not observe Claimant having any physical problems affecting his ability to do

any of his work on the boats or at his painting jobs. (CX 83 at 3-11)

Mr. Duncan was paid by Claimant either by check or by cash and the work on the Crosby home was delayed at least several weeks by a lack of water pressure and also by the "weather .. rain and that kind of thing." Mr. Duncan did not work on the Curtis home but he did work on the Joyce home and the Widmayer home for several days. Mr. Duncan, after being shown an exhibit identified as Deposition Exhibit 3, testified that he worked on the Rosenblum house, as well as Donny Page's, Deborah Shaun's and Ruth Joyce's. Mr. Duncan had no difficulty getting any paint supplies for the various houses because "usually he (Claimant) had everything ready." Scott Blevins and his brother also did some painting work for Claimant and Mr. Duncan believes that "Ken was upset with him (Mr. Blevins) because of one of the jobs." Mr. Duncan was paid $10.00 per hour at the start and he then received a raise to $12.00 per hour. There was also a problem at the Curtis house because Mr. Blevins "didn't finish painting up by the eaves and ... he had his radio really loud and the neighbors were complaining or something like that." Mr. Duncan estimated that he worked about fifteen to twenty hours for Claimant each month, "sometimes more. It's hard to tell." (CX 83 at 11-20)

Mr. Duncan worked part-time for the Claimant whenever he was available and the Claimant needed his services. He believed he earned around $2,000.00 working for Claimant during that one year period, although checks might total $2,500.00. (CX 83 at 21)

The parties deposed Curt L. Crosby on January 12, 1999 (RX 11) and Mr. Crosby, who has worked for the Employer for about two and one-half years as "a ship's joiner, which is like cabinet work," and who also has worked as a commercial fisherman for sixteen years, met Claimant in January of 1997, at which time Claimant was hired as a painter by the Employer. Mr. Crosby contracted with Claimant in July of 1997 to have his house painted for approximately $5,299.00, the work to be completed by October 16th. Mr. Crosby knew that Claimant would have a crew help do the painting but he did tell Claimant that he did not want Scott Blevins on the crew because "he was kind of rough." A $1,600.00 deposit was paid to Claimant on July 6, 1997, another $2,000.00 was paid in August of 1997 and another $400.00 was paid in October of 1997. As of October 16, 1997 Claimant had "completed a little over half" of the house because "(t)here weren't enough hours spent on the house," Mr. Crosby remarking, "there were days that ... Ken would do, he would come and maybe spend a couple of hours at times and then you wouldn't see him for three to four days." According to Mr. Crosby, Chad Duncan did most of the painting on the house and the last work there was done in October or November of 1997,

"just before there was snow." After the snow had melted in the spring, Claimant did not return to complete the work because he later learned that Claimant sustained an injury at the Employer's shipyard on April 14, 1998. Mr. Crosby is aware that Claimant is litigating that injury with the Employer and he refused to permit Claimant or anyone else on his behalf to finish the work because of the liability issue. The summer of 1997 was quite dry and Mr. Crosby believed that outside painting would have been delayed about "ten days," but even during the rain the exterior could still have been power-washed. Mr. Crosby conceded that the lack of water pressure on his property "might have caused at the most a couple of days' delay." (RX 11 at 3-20)

Mr. Crosby then described the areas of the house and attached garage that had not been completed. Claimant's wife, his brother and his brother-in-law, Mohammed, also worked on the Crosby house. A verbal agreement was reached in April of 1997 about painting the house and Claimant measured the house and priced the work in July of 1997. Mr. Crosby hired Claimant because he had seen the work Claimant had done painting the house of Tim Hodgdon. Mr. Crosby had "no problems" with the work done by Claimant or by Mr. Duncan but he did have a problem with whomever "painted the trim on the east side" of the house. Mr. Crosby has not yet hired anyone to finish the work, Mr. Crosby estimating that it would cost him about $2,500.00 to have that work done. Mr. Crosby "didn't realize that he (Claimant) was painting a lot of other houses" because that information came to him "at the very end." (RX 11 at 21-33)

The parties deposed Merritt Grover on January 6, 1999 (RX 12) and Mr. Grover, owner of Grover's Hardware, a family-owned business with ten (10) part-time employees in Boothbay Harbor, testified that in response to a subpoena he had produced four (4) sets of documents (Grover Depositions Exhibits 1, 2, 3 and 4) showing sales transactions, from January 1, 1995 until April of 1998, between his store and Claimant doing business as Markee Painting. Mr. Grover first met Claimant "definitely in the '80s" when Claimant "was painting for Russ Piercy (for six months to a year) before he (Claimant) went out on his own." Mr. Grover hired Claimant "probably around 1990" to "restain" his home, Mr. Grover remarking that Claimant "does know what he's doing in the painting field." Mr. Grover who was satisfied with the work Claimant performed on his house testified that Claimant became a fairly regular customer of Grover's purchasing supplies sometimes in the 1980s, that "a good customer is someone who spends in excess of a thousand dollars a year and pays every bill on time," that "he was a good customer" in the late 1980s and early 1990s, that he verbally hired Claimant a second time in May of 1996 to paint his house for an agreed price of $6,000.00, that $2,000.00 was paid as a deposit, that the work began in the Summer of 1996 and "was to be completed by August of

1996."

According to Mr. Grover, "the main person who did the brunt of that work was Ronnie Hyson, who would often just show up on weekends to stain by himself without Markee's involvement at all;" he was not pleased with the progress being made and the house was not completed on time and only half of the work had been completed by the end of December of 1996, Claimant attributing the lack of progress to weather problems at the beginning. Mr. Grover regrets hiring Claimant to paint his house because weather was not a legitimate excuse throughout the entire summer as there were sunny days and "there was certainly ample time to stain someone's house." Mr. Grover knew that Claimant was painting other houses because he or his employees "would recommend him for jobs." He knew Claimant was painting the Ted Widmayer house and there were two dissatisfied customers to whom Grover had recommended Claimant for painting work. These customers were dissatisfied because "they paid him money in advance for work that was either never started or never completed," also during that 1996 time period. Mr. Grover is aware that Claimant owes Scott Blevins money for subcontracting painting work that he did for Markee Painting Company before April of 1998, that Claimant was having financial difficulties before 1998 because "(h)aving several vehicles repossessed is usually a pretty good clue" of financial problems. (RX 12 at 3-17)

With reference to the subpoenaed documents, Deposition Exhibit 1 are invoices showing purchases by Claimant for the time period March of 1994 through July of 1995 and a balance of $2,999.39 as of July 31, 1995. While Claimant did make payments to his account during that time period, at no time did he pay a balance down to zero, and that is why he had that balance as of July 31, 1995. Grover deposition Exhibit 2, a smaller batch of invoices, relates to purchases by Claimant from December of 1996 through April of 1998. Sometime between April and November of 1998 Claimant filed for bankruptcy protection and owed Mr. Grover $407.60 at that time. No further payments had been made as of the date of the deposition. Deposition Exhibit 3 "is another batch of invoices from April '97 to ... October of '97." Deposition Exhibit 4 are billing statements from January of 1995 through August of 1998 and Deposition Exhibit 5, dated June 30, 1996, relates to the $2,000.00 advance payment made to Claimant to paint the Grover home. Mr. Grover further testified that he revoked Claimant's charging privileges "there or four" times before April of 1998 because "he owed us too much money," a balance at one time which amounted to $3,900.00. However, as of December 24, 1996, the balance "was only sixty-eight forty-one" because the December 10, 1996 balance of $3,439.68 would be considered forgiven if Claimant completed painting the house in May of 1997 as soon as weather permitted and the snow melted. The work was not completed although

Scott Blevins did some painting, the quality of which "was fine," but still leaving one-fourth of the house to be done in the Spring and Summer of 1997. Mr. Grover would not recommend Claimant to any other potential customer and, as a result of his experiences with the Claimant, he changed his credit policies in 1998 so that even long-term customers are refused credit if their bills go above a certain level with which he is "uncomfortable." (RX 12 at 18-28)

The 1997 painting on the Grover home was done by Scott Blevins and two other workers but Claimant was not part of that crew, although Claimant did come over on two occasions to check on the progress, and it was obvious to Mr. Grover "that Blevins worked for Markee." Mr. Grover discussed with Mr. Blevins and the Claimant, in October of 1997, his concerns about the amount of work still to be done, Mr. Grover remarking that the last person to work on his house was Mohammed Osman, Claimant's brother-in-law. Claimant also did some work in the early 1990s for Mr. Grover's father, the work involving "sand(ing) two floors at his cottage in Southport" and work which was performed in an "excellent" manner. Mr. Grover believes that Claimant "did some painting at Grover's 10 or so years ago," the work involving "staining Grover's Hardware back deck around 1980-1990." (RX 12 at 28-34, 52, 61)

With reference to the invoices, Mr. Grover's policy is to indicate thereon any carryover balance, as well as indicating any payment by cash or check and indicating the name of the project for which the supplies are being purchased if requested to do so by a customer such as the Claimant. A billing statement was mailed to Claimant each month. Claimant began to paint the Grover home in June of 1996 and Mr. Grover could not recall the names of the two other dissatisfied customers of Markee Painting Company. In fact, those customers "were not very happy" and "they still refuse to come to Grover's Hardware because of it."

The Claimant's problems with Ted Widmayer also surfaced at about the time Mr. Grover was having his problems with Claimant whom Mr. Grover described as a business customer and not as a social friend. Mr. Grover continued to recommend Claimant to his customers because he "was still giving (Claimant) the benefit of the doubt" and because he did not "become really dissatisfied until the end of '96 when it was obvious that the weather would prohibit that job from being finished in 1996, coupled with the fact that ... he was unable to pay his bill, and (Mr. Grover) wanted to try to help get him straightened around and get him some work so that he could continue to be in business and be an account that ... would (be paid) on time." Mr. Grover doubted that he recommended Claimant to others in 1997 but he conceded that he may have done so early in the year because he cannot recall exactly when their business relationship soured to the point that he would no longer

recommend Claimant to another customer. Mr. Grover is aware that Claimant also purchased supplies from Poole Brothers, another hardware store in Boothbay Harbor. Claimant began purchasing supplies from Grover's Hardware "somewhere between '88 and '90" and he continued to do so until April of 1998, and his annual purchases, after that first year, averaged "probably average(d) 2 to $3,000 a year." The invoices and billing statements are stored by fiscal year in the cellar of Grover's Hardware and are kept on a monthly basis for each customer. Claimant's statements end in August of 1998 "because he went bankrupt."

As of January 24, 1995, Claimant's balance was $4,882.80 and Mr. Grover did not write off completely any other balance for Claimant, although he "removed late charges and gave discounts past the (ten-day) date." Mr. Grover made two payments of $2,000 to the Claimant for the work Claimant was to do in 1996 and 1997 and he recommended Claimant to other potential customers for his services because "he was a good painter" and he "really was a quality craftsman" and "he was someone who bought a lot of materials from Grover's Hardware," Mr. Grover remarking that he would not recommend anyone who did not "do good work" and that, in comparison to other painters, Claimant "seemed to be about average." (RX 12 at 35-60)

As noted, the Respondents have disputed a work-related injury occurred on April 14, 1998 in the manner as alleged based on the testimony of Mr. Widmayer and Mr. Russell, especially as there are no eyewitnesses to the accident. However, I credit and accept the witnesses offered by Claimant on this issue as those witnesses testified credibly that Claimant, as a highly-motivated, hard-working and industrious individual, absolutely did not complain about any back, neck or leg problems before April 14, 1998, that he had no such problems before beginning to work in the deck locker at the start of his shift on that day, that he worked most of his shift in the tight, narrow and confined areas of that locker and that he did experience the immediate onset of pain to multiple body parts, according to Claimant's uncontradicted testimony and the Employer's first injury report (CX 54), after stretching and reaching for a chisel.

This Administrative Law Judge in concluding that Claimant injured multiple body parts on April 14, 1998, rejects the testimony of Mr. Russell about the conversation relating to obtaining benefits from the V.A. because (1) Mr. Russell also agreed that the Claimant was able to perform all of his assigned duties in that physically demanding job at the shipyard, (2) the conversation that he had with the Claimant related to learning about the process of obtaining a purple heart for Claimant's wife's grand-father, an attempt in evidence as CX 81 (3) there apparently

is some tension between Claimant and Mr. Russell, as manifested by the latter's complaints to the landlord, Jeff Curtis, about "the mess" and "noise" made by Scott Blevins, a subcontractor of the Claimant's while working at the Curtis home and (4) Mr. Russell's reluctance to even work nearby the Claimant or even in the same room, unlike the other co-workers who testified before me. (TR 288-289)

I also give little weight to the testimony of Mr. Widmayer because it is obvious that he is confused about the date at which Claimant told him the work was delayed because of "a disc problem." While he testified that Claimant told him that in late March or early April of 1998, and before April 14, 1998, there are no telephone records to substantiate the testimony that Mrs. Widmayer telephoned Claimant on a certain date and that two (2) weeks later Claimant returned her telephone call and it was during this telephone call that Claimant advised Mr. Widmayer of his back problem. Moreover, the testimony that Claimant injured himself on "a sea chest" (whatever that item is) corroborates, to a certain extent, Claimant's testimony that he injured himself while working on a deck or sea locker. Claimant's testimony on this issue is quite specific and definitive and that of Mr. Widmayer is vague, uncertain and speculative as to when the telephone call was returned by Claimant, especially as the Widmayers did not discharge Claimant until June 22, 1998 at the earliest. (RX 5) Furthermore, while there are no eye-witnesses to the accident itself[1] and while certain of Claimant's witnesses at the hearing are relatives and friends, that fact alone does not negate the occurrence of a work-related injury and, on the basis of this closed record and for the reasons detailed above, I find and conclude that Claimant injured multiple bodily parts on April 14, 1998, in the manner that he alleges. The doctors, especially Dr. Wilson (CX 82), have found Claimant to be a credible historian and patient and I likewise find him to be a credible witness.

Claimant's medical records reflect that he was treated for gastrointestinal problems between February 3, 1981 and March 7, 1981 (CX 45 at 171-176) and that he went to the Emergency Room at St. Andrews Hospital on August 16, 1986 for evaluation and treatment for "pain (in) mid lumbar region" and Dr. Long prescribed Septra for the next two (2) weeks. (CX 4 at 10)

Even assuming, **arguendo**, that Claimant had experienced back

[1]Actually, an accident inside the confining space of that deck locker is not susceptible of an eye witness. However, Claimant was immediately seen by a co-worker thereafter in obvious physical distress.

problems prior to April 14, 1998, such pre-existing condition does not defeat the claim because it is well-settled that the aggravation of a pre-existing condition by working conditions at the Employer's shipyard resulted in a new and discrete injury on April 14, 1998, thereby making the entire disability compensable and, **a fortiori**, the responsibility of the Employer.

Accordingly, I reiterate that Claimant sustained a work-related injury to multiple body parts, and I so find and conclude.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

This closed record conclusively establishes, and I so find and conclude, that the Respondents had knowledge of Claimant's work-related injury on the day of its occurrence. (CX 54)

Statute of Limitations

Section 13(a) provides that the right to compensation for

disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (1989). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

It is well-settled that the Employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

Claimant's claim for compensation, dated May 4, 1998 (CX 55), was received by the Respondents on May 4, 1998. (CX 56) Accordingly, Claimant has complied with the requirements of Section 13(a) of the Act.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability

of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot now return to work as a painter/shipbuilder. The burden thus rests upon the Respondents to demonstrate the existence of suitable alternate employment in the area. If the Respondents do not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Respondents did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

In the case at bar, the Respondents have offered a surveillance videotape (CX 51) of Claimant's activities on August 19 and 27, 1998, as well as the testimony of Stephen Handcock

(CX 50) in an attempt to demonstrate that Claimant is not totally disabled. Mr. Handcock, a licensed private investigator since 1992, was employed by the Carrier on or about May 22, 1998 to monitor Claimant's activities and his preliminary report is dated June 30, 1998. (CX 48) A second and final report is dated August 31, 1998. (CX 49) Mr. Handcock and Mr. Stephen Jastermsky performed the actual surveillance together after it was determined that a second investigator was needed "as Mr. Markee had several ways to leave from his residence and we wanted to cover all directions." Mr. Handcock spent a total of 42.50 hours, including fourteen (14) hours of travel time investigating Claimant and Mr. Jastermsky spent hours, including three (3) hours for travel. (CX 51 at 3-19)

In the course of their surveillance of the Claimant they did not observe Claimant doing any gardening, any digging of any kind, any work either on the house or on the grounds, or carrying any tools or doing any painting, climbing ladders, or chopping wood or fishing or hunting, playing golf or any other sporting activities or playing with or lifting his children or engaging in any other physical activities other than standing, sitting or walking. Mr. Handcock did observe Claimant walking with "a slight limp" and did not interview any witnesses during the course of his investigation although he did talk to Timothy Hodgdon on June 24, 1998, at 8:15 a.m., at which time Mr. Hodgon advised him that "Mr. Markee potentially (was) screening his calls." Earlier in that day, at 5:37 a.m., a yellow pickup truck with New York license plates departed the Markee residence and was driven to the Employer's yard and Mr. Handcock later learned that the driver was Lee R. Karkuff. While there was a motorcycle covered with a tarpaulin in Claimant's yard, Mr. Handcock did not see it moved at all from that position. (CX 51 at 19-25)

I note that Mr. Handcock's June 30, 1998 report states in the details section: "The Claimant alleges a low back injury. The insurance company had received an anonymous call from the number (deleted)[2] stating the Claimant was 'scamming the insurance company'." I also note that the surveillance reports total eighteen (18) pages (CX 48 and CX 49) and all that the videotape and the reports establish is that Claimant is not totally bedridden or housebound, that his limited activities do not contradict or impeach his September 25, 1998 deposition testimony given before Claimant was given a copy of the surveillance videotape. (CX 51) I note that the Benefits Review Board has even permitted an award of benefits to an employee while incarcerated. In this regard, **see**

[2]The telephone number has been deleted from this decision for obvious privacy reasons.

Allen v. Metropolitan Stevedore, 8 BRBS 366 (1978) I also note that there is no videotape of Claimant and his wife apparently shopping at a grocery store on Saturday June 27, 1998, Claimant exiting the store "10 to 15 minutes later," walking with "a slight limp" and "with a small potted plant in hand." (CX 51 at 231)

Accordingly, in view of the foregoing, I find and conclude that Claimant is totally disabled and has been since April 14, 1998.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

Claimant has not yet reached maximum medical improvement as additional medical care and treatment has been recommended to return him to the **status quo ante** he enjoyed on April 13, 1998. In fact, Claimant's recovery has been delayed significantly because Respondents would not authorize all of the medical treatment required by Claimant.

Average Weekly Wage

For the purposes of Section 10 and the determination of the

employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). Accordingly, this Administrative Law Judge should include the weeks of vacation as time which claimant actually worked in the year preceding his injury. **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks

is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for the 52 weeks prior to April 14, 1998. However, as Claimant's average weekly wage should include his concurrent wages as a painting contractor, Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

The parties took a discovery deposition of Robert S. Amidon (RX 13, Two volumes) and Mr. Amidon, a certified vocational

rehabilitation counselor who has worked full-time in that field since 1985, testified as to his professional qualifications for another company for two and one-half years and then since December of 1987 for his own firm doing business as Amidon Counselling Services working with patients dealing with determining job placement, transferrable skills and career alternatives within their physical limitations and job restrictions. Mr. Amidon has done such work for Attorney Gabree once or twice in the past dealing with claims under the Longshore Act, in addition to the case at bar. This is Mr. Amidon's first matter involving the determination of an employee's average weekly wage pursuant to Section 10(c). Mr. Amidon met with Claimant and Attorney Gabree on November 2, 1998 and that "first substantive interaction" is reflected in six pages of interview notes Mr. Amidon. Deposition Exhibit 1 is Mr. Amidon's billing statement and Deposition Exhibit 2 are the interview notes. Deposition Exhibit 3 reflects "some determinations as to the earnings that Mr. Markee might enjoy" in self-employment as a carpenter, painter, drywall and carpenter based on several different scenarios such as 20-day and 30-day work weeks, at $25 per hour, Mr. Amidon describing the document as "really incomplete." (RX 13, Vol. I, 3-20)

Mr. Amidon, after discussing Claimant's employment history since his discharge from military service in 1980(?), testified that his notes reflect that Claimant told Mr. Amidon that he was earning $13.00 to $14.00 per hour in self-employment in 1996, and Deposition Exhibit 8 and Claimant's tax returns were used by Claimant to corroborate that 1996 hourly rate, Mr. Amidon remarking that he "was not asked to find out exactly what he'd earned" but to ascertain "his earnings capacity" and "of what he was capable of earning" in such self-employment. Mr. Amidon utilized "a publication by Marshall and Swift that defines specific costs of work that is done in the painting and carpentry stuff,"[3] a publication with which Claimant was familiar and which he used to estimate a particular job for a customer. Claimant advised Mr. Amidon how he estimated floor work, decorative painting, regular painting, roofing work, etc., and that he did such self-employment work six days each week in the time period from December of 1996 to April of 1997. Deposition Exhibit 4, dated December 17, 1998, the date of the deposition, relates to a conversation he had with Attorney Gabree relating to Section 10(c) and a determination of "the reasonable value of services of (the) employee or the cost of hiring somebody to do the work that he was doing." Mr. Amidon, after researching the issue, was able to arrive at a determination as to the reasonable value of Claimant's self-employed services and

[3] **Marshall Evaluation Service, Marshall and Swift, The Building Cost People**, published in 1998.

as to the cost of hiring someone to do the work in the event that he were not able to perform that work, and those values, depending upon the type of work, are reflected in Deposition Exhibit 5. For example, working sixty (60) hours per week at $25.00 per hour would produce "earning(s) in the neighborhood of $75,000.00 a year." According to Mr. Amidon, Claimant's hourly rate as a painter would vary from a low of $12.00 to a high of $35.00. Deposition Exhibit 8 refers to the $20,423.47 Claimant earned from his work for various customers of Markee Painting. Deposition Exhibit 6 contains information that Mr. Amidon received from the Department of Labor in the Portland area about certain wage records in the area. Deposition Exhibit 7 are the Maine Construction Wage Rates of 1997 for various trades such as a carpenter. (RX 13, Vol. I, 21-56)

Deposition Exhibit 8, entitled Income Calculations, is a document obtained from Attorney Gabree at the time of the November 2, 1998 interview at the attorney's office. Mr. Amidon reviewed certain of Claimant's tax returns not so much as to confirm the actual earnings but mostly to confirm that he had been working during those years. Deposition Exhibit 11, a document furnished by Attorney Gabree, actually supports Deposition Exhibit 8 and relates to payments, invoices and checks of the subcontracting work done by Claimant. Deposition Exhibit 10 are ceratin of Claimant's medical records. Claimant advised Mr. Amidon that he had hired employees to assist him in his self-employment business but that this would not have a bearing on his opinions "because (his) calculations took a different track in terms of (his) arithmetic tracking of earnings." While Mr. Amidon is aware that Claimant declared bankruptcy in the summer of 1998, he did not request the bankruptcy file because that would have no bearing on Claimant's earning potential in self-employment. (RX 13 a, Vol. II 3-15)

With reference to Claimant's earning potential as Markee Painting, Claimant working sixty (60) hours per week, at $25 an hour, fifty (50) weeks a year, would be expected to earn $75,000.00 or an Average Weekly Wage of $1,500.00. While Mr. Amidon conceded that a self-employed painter would incur certain expenses and costs in doing business, he did not factor those expenses in determining gross income and his Average Weekly Wage because "it really would depend on how he charged his clients," **i.e.**, "in some cases there's an hourly wage plus costs and expenses, for instance, for paint, for materials." Mr. Amidon pointed out that Deposition Exhibit 8, reflecting "roughly a $32,000 gross figure results in approximately $20,000 net," after deduction of certain business costs. Mr. Amidon was not aware that Claimant testified at his deposition that he was earning an average or $20 per hour in his painting business. Mr. Amidon opined that it would cost Claimant $35 an hour to hire

someone to do decorative painting that Claimant cannot perform, or $105,000 per annum. (RX 13a, Vol. II, 16-29)

Mr. Amidon is aware of at least "half a dozen" ways to calculate the reasonable value of an employee's services, one of which is determining "the replacement value of those services." He also learned during his November 2, 1998 interview of the Claimant that Claimant regularly worked eighty (80) hours per week in the years prior to April of 1998. In addition to the forty (40) hours per week working for the Employer, Claimant in self-employment, at $25 an hour, could earn approximately $25,000 a year (for 20 hours weekly), $37,500 a year (for 30 hours) and $50,000 (for 40 hours). (RX 13A, Vol II, 30-33)

The parties also deposed Mr. Amidon on January 11, 1999 (RX 79) and Mr. Amidon restated that he had been retained by Attorney Gabree to determine (1) "the reasonable value of the services of an employee engaged in self-employment" and (2) "the cost of hiring another worker of comparable skill and experience to do Ken Markee's work." (RX 79 at 20) In between his December 17, 1998 and his January 11, 1999 depositions, Mr. Amidon had the opportunity to view the hearing testimony of the Claimant and Darcie Page and the deposition testimony of Merritt Grover, Chad Duncan, Dr. Maurice Knapp, as well as the September 29, 1998 Concentra report of Abraham Memana, a document identified as Deposition Exhibit 2. Mr. Amidon also spoke to the Claimant and he verified certain figures Mr. Amidon had used in Deposition Exhibit 1. (CX 79 at 20-28)

Mr. Amidon identified Claimant's transferrable skills based on his self-employment work in the painting business, his work building yachts for the Employer and his other work, all of which information was obtained during a 90 minute interview on November 2, 1998 and a subsequent 15 minute telephone conversation. Mr. Amidon reiterated his opinions that Claimant regularly worked eighty (80) hours per week prior to his April 14, 1998 injury, that he would have continued to work those hours but for that injury, that he would have earned for working 20, 30, 40, 60, 70 and 80 hours per week, based upon an hourly rate of $25.00, the following amounts $50,000.00 (for 40 hours) in addition to his earnings for the Employer; $37,500.00 (for 30 hours); $25,000.00 (for 20 hours), $75,000.00 (for 60 hours); $87,500.00 (for 70 hours); $100,000.00 (for 80 hours), all of which work would be in addition to work for the Employer. Two thousand hours, fifty weeks per year at forty hours per week, is considered full-time work on an annual basis. With reference to hiring someone to assist the Claimant, Mr. Amidon estimated that it would cost approximately $18,000.00 to hire a subcontractor to assist the Claimant. (CX 79 at 29-66)

Mr. Amidon disagreed with Mr. Memana's December 29, 1998 report wherein Mr. Memana opined that Claimant's wage and tax records between 1993 and 1997 established an average hourly income of $13.87, Mr. Amidon opining that Claimant could be expected to earn $25 an hour as a painter as a weighted average between a low of $12 and a high of $35 per hours, producing an hourly rate of $25.11. Mr. Amidon's answers "essentially" did not change in the interval between his two depositions. He again conceded that that hourly rate did not factor in any of the usual costs associated with conducting a painting business, such as purchasing paints and supplies or hiring subcontractors to assist in doing the work. (CX 79 at 67-80)

Mr. Amidon conceded that Schedule C of Claimant's 1997 tax return reflected the following:

	$32,000.00	gross pay
-	$11,631.29	business costs
-	$ 3,032.00	supplies, etc.
	$17,190.66±	net
÷	52=	
	$ 330,59	as an Average Weekly Wage

Mr. Amidon also agreed that factoring in a certain percentage representing costs and expenses to his previously expressed annual earning capacity of $57,000.00 to approximately $46,000.00 or $47,000.00. He also agreed that Claimant never earned more than $46,000.00 in any of those years. Mr. Amidon, in determining Claimant's earning capacity, would not factor in as business costs items such as telephone services, depreciation of cars, etc. because the "question of what an earning capacity is typically the gross income." Claimant's replacement costs would also be pretty much synonymous with what Claimant could be expected to earn. (CX 79 at 81-113)[4]

Claimant submits that in addition to the forty (40) hours per week he worked for the Employer, he routinely worked another forty (40) hours that week as a painting contractor. However, I find that figure of eighty (80) hours per week to be unreasonable, especially as Claimant's tax records do not reflect annual earnings above $47,000.00. This Administrative Law Judge regularly devotes about sixty (60) hours per week to presiding over cases, drafting decisions, etc., as well as performing the usual duties of a

[4]Objections raised at Mr. Amidon's depositions by either side are overruled as the information sought is relevant and material herein and the objections really go to the weight to be accorded to the testimony.

District Chief Judge. This still leaves a reasonable amount for family obligations.

Thus, I find and conclude that sixty (60) hours per week is a reasonable amount, especially as this closed record establishes that certain of Claimant's customers have testified that they did not see that much of Claimant at the job site.

Claimant submits that his average hourly rate for the twenty (20) hours per week he devoted to Markee Painting Company should be reimbursed at the hourly rate of $25.00, based on Mr. Amidon's expert opinion. (CX 84) On the other hand, Respondents submit that an hourly rate of $12 or $15 is more appropriate, if these concurrent earnings are to be factored in at all. (RX 16)

I find an hourly rate of $20.00 is appropriate as a reasonable determination of Claimant's concurrent wages as a painting contractor, thereby producing an average weekly wage of $400.00 ($20.00 x 20=) for these concurrent wages. Thus, as the parties have stipulated that Claimant's wages with the Employer produced an average weekly wage of $582.13, Claimant's average weekly wage as of the date of his injury may reasonably be set as $982.13.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459

U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

As already noted, the final issue in this case concerns the compensability of Claimant's medical bills. These consist primarily of bills associated with two separate procedures: A) Claimant's neck MRI; and B) his scheduled spinal fusion surgery in January of 1999.

Despite the magnitude of evidence in this case, there is relatively little evidence which addresses the two separate issues generated by the carrier's refusal to pay for his neck MRI bill: i) causation of his neck problem; and ii) the reasonableness and necessity of the bill under §7 of the Act.

Contrary to suggestions by the Respondents, Claimant has complained of upper back, neck and upper extremity problems since his injury on April 14, 1998. These complaints are documented in the April 30, 1998 diagram required by Dr. Moran's office. (CX 1) Dr. Webster's phone log note of May 18, 1998 further documents the employee's complaints in this regard. (CX 16)

They are further substantiated in Dr. Webster's report of July 21, 1998 in which she notes that Claimant had been complaining to her office of "numbness in his hands and pain in his upper back since his original injury of 4-14-98." (CX 19)

Likewise, Dr. Bouffard documented the employee's "cervical pain" in his June 2, 1998 and July 14, 1998 reports, noting that the problems were "work related" in both reports. (CX 28) His comprehensive patient health history documents the existence of Claimant's neck and upper back symptoms since his injury on April 14, 1998. (CX 31)

Dr. Webster recommended that Claimant receive the cervical MRI test (CX 21 at 29, 30) and the patient's symptoms "following his accident" caused her to do so. (CX 21 at 31) She noted that the possibility that the April 14, 1998 injury may have also produced upper extremity, upper back and neck symptoms motivated her desire to have the cervical MRI done. (CX 21 at 33)

The only countervailing evidence on this issue was provided in Dr. Kolkin's opinion. However, I find to be more probative the persuasive opinions of Claimant's treating physicians, as discussed above.

Claimant has suffered "harm" in the form of upper back, upper extremity and neck symptoms. He therefore has satisfied the first requirement of the §20 presumption. The record also clearly establishes that conditions existed in his work which could have caused his injuries; his employment required him to perform his work as a painter while twisting in tight quarters and in other physical work consistent with that typically required of a painter in a boat yard. Furthermore, I have already concluded that Claimant was injured on April 14, 1998 while working at Hodgdon Yachts. Accordingly, there is no doubt that the second requirement of the §20 presumption has been satisfied. Accordingly, the Claimant here has therefore successfully invoked the §20

presumption and has established a **prima facie** case that his upper extremity, upper back, and neck symptoms arose out of and in the course of his employment, specifically when he was injured on April 14, 1998.

The Respondents have failed to rebut this **prima facie** case. However, unlike the analysis above with regard to the Claimant's back injury, Respondents have, in fact, produced evidence that the Claimant's symptoms do not arise out of the incident of which he complained. However, the production of Dr. Kolkin's opinion on this issue is unpersuasive, and in any event, insufficient to sustain their burden of "establish[ing] that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury." **Quinones v. H.B. Zachary, Inc.**, 32 BRBS 6, 8 (1998), **citing Cairns v. Matson Terminals**, 21 BRBS 252 (1988). The carrier has failed to rebut the presumption, as they have not introduced substantial evidence to the contrary, as is required. **Butler v. District Parking Management Co.**, 363 F.2d 682 (1966); **Manship v. Norfolk & Western Railway Co.**, 30 BRBS 175 (1996). This burden means that the carrier was required to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment; this they have failed to do. **Swinton v. J. Frank Kelly, Inc.**, 544 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on April 14, 1998 and requested appropriate medical care and treatment. However, while the Respondents eventually did accept the claim and did authorize certain medical care, the Respondents have failed to authorize a cervical myelogram and the lumbosacral fusion recommended by Dr. Webster. As I have already found above that Claimant injured multiple body parts on April 14, 1998, including his upper back and cervical areas, the Respondents are responsible for those expenses and the recommended surgery shall be immediately authorized so that Claimant can have the normal recovery period and his residual work capacity determined so that he can return to gainful employment as Claimant, as a highly-motivated and industrious individual, simply will not want to remain at home, collecting compensation checks.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review

Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents have timely controverted Claimant's entitlement to benefits. (CX 56, RX 68) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer and its Carrier ("Respondents"). Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after July 10, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this decision and Respondents' counsel shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer and Carrier ("Respondents") shall pay to the Claimant compensation for his temporary total disability from April 15, 1998 through the present and continuing, based upon an average weekly wage of $980.13, such compensation to be computed in accordance with Section 8(b) of the Act.

2. The Respondents shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his April 14, 1998 injury.

3. Interest shall be paid by the Respondents on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, including authorizing and paying for those medical expenses specifically discussed herein, as well as payment of those medical bills in evidence as CX 11, CX 20, CX 26, CX 34, CX 44, CX 52.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Respondents' counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on July 10, 1998.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:ln